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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. CHRISTOPHER MICHAEL MEIER, Defendant and Appellant.	D074589 (Super. Ct. No. SCD274701)

APPEAL from a judgment of the Superior Court of San Diego County, David M. Gill, Judge. Reversed with directions.

Gregory L. Cannon, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Julie L. Garland, Assistant Attorney General, Daniel Rogers and Christopher P. Beesley, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant Christopher Michael Meier appeals from a judgment entered after a jury convicted him of two counts of burglary and one count of resisting arrest.

On appeal, Meier raises two issues. First, Meier argues that the case should be remanded to allow the trial court to exercise its recently granted discretion to strike a prior serious felony enhancement under Penal Code[1] sections 667, subdivision (a) and 1385, subdivision (b).

Second, Meier argues that the case should be remanded to allow the trial court to exercise its discretion to grant mental health diversion under another recently enacted statute, section 1001.36, which allows courts to grant pretrial diversion to defendants who suffer from mental disorders and whose mental disorders played a significant role in the charged offense or offenses.

We agree with Meier on both points. Therefore, we reverse the judgment and remand the matter to the trial court for the following limited purposes: The court shall hold a pretrial diversion hearing under section 1001.36 to determine whether Meier is eligible for diversion and, if so, whether to exercise its discretion to place Meier on diversion pursuant to that statute. If the court declines to grant Meier diversion or if Meier is placed on diversion but is unsuccessful in completing his diversion program, the

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1 Further statutory references are to the Penal Code unless otherwise indicated.

court shall reinstate Meier's convictions[2] and shall resentence Meier. In conducting any further sentencing proceedings, the court shall exercise the discretion granted to it under sections 667, subdivision (a) and 1385, subdivision (b) to either strike or reimpose the five-year prior serious felony enhancement.

II.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Factual background*

1. *The prosecution*

On the afternoon of November 29, 2017, Sallie B., who lives with her husband and son in a condominium in San Diego, was at home. She saw the shadow of a man cross her patio balcony and move toward her patio door. Sallie was startled because it would be difficult for anyone to reach that location from the outside. Meier opened the door leading from the balcony into the condominium, pushed through a drawn set of blinds, and entered Sallie's home. Upon entering the home, Meier stopped at a table on which Sallie had put her purse, pointed to the purse, and mumbled something that Sallie could not understand. Meier then looked up and made eye contact with Sallie

Sallie asked Meier, "What are you doing here? What are you doing?" and "directed him to get out." Sallie then "screamed for" her husband, who was taking a

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2 By "convictions" we intend to include not only Meier's convictions on the substantive offenses charged, but also any related enhancements and the true findings regarding the allegations that he served a prior prison term, suffered a prior serious felony, and was on parole at the time of the offenses.

shower. According to Sallie, at some point Meier seemed to "register . . . the layout of the apartment," and started to move quickly down a hallway, toward the front door. Sallie followed Meier to the front door and watched him as he exited her condominium and walked down the common hallway outside of her unit. It appeared to Sallie that Meier was touching doorknobs to other condominiums as he made his way down the hallway. There was a doorway at the end of the hall that Sallie believed "kind of sections off maybe a more exclusive unit." Meier went through that door. Sallie then called for assistance from the building's security personnel.

When security officers responded to Sallie's floor, she directed them to the unit that Meier had entered.

Clayton N. lives down the hall from Sallie. On November 29, 2017, building security called him to tell him that they thought that someone was inside of his unit. Clayton rushed home to meet security personnel outside his front door. From there, he could hear rummaging from inside his home—what sounded like cupboards opening and closing and someone moving things around. Clayton called the police.

Upon arriving, police officers assessed the situation and set up a perimeter around Clayton's unit. One officer went around to "a patio kind of thing that wraps around the building" so that she could "guard that door." Less than a minute after the officer went out to that balcony, other officers could hear her yelling at someone to "[s]top." The officer on the outside perimeter balcony had seen Meier. When Meier saw her, he started running. Although the officer yelled for Meier to stop and show his hands, Meier briefly showed his hands and then looked over a ledge and jumped onto an adjoining building.

Meier then ran toward another ledge, but would have had to jump approximately 20 feet to reach the ground. At that point, Meier stepped back from the ledge. Officers detained Meier and recovered multiple duffel bags and other bags "placed at different places on the top of the roof," where Meier had left them.

2. *The defense*

Meier testified on his own behalf. Meier said that he first developed "a real problem with drugs" when he was 23 years old. In the past, Meier had used "just about everything," including pain pills, heroin, crystal methamphetamine, LSD, GHB, marijuana, and alcohol.

Meier was sober for roughly two years, but he relapsed and started using hard drugs again approximately nine to 12 months before the events underlying the current charges. He had used a lot of crystal methamphetamine and GHB during the nine months prior to the current offenses.

Meier testified that he was homeless at the time of the offense and was in an area of downtown San Diego near the library on November 29, 2017. According to Meier, he had been awake for four or five days at that point and was under the influence of crystal methamphetamine. During the five hours preceding the events of November 29, he had used the drug.

Meier testified that during that time, he was having hallucinations about "the end of the world or something." Meier observed other individuals around him, and believed that those individuals were involved in "the end-of-the-world situation." Meier testified that he was interpreting other people's body language as involving bizarre messages

meant for him. According to Meier, people were "giving [him] signals" and suggesting that he "go up to the roof" and that he "needed to do to get to the next stage of this."

Meier testified that he entered Sallie's condominium, as well as Clayton's condominium, with the intention of getting to the roof of the building. He admitted to rummaging through Clayton's condominium. He packed items that he found in that condominium into different bags, intending to take the items to the roof with him. Meier was in the second condominium for 30 to 60 minutes. When he tried to leave through a back door, he found himself on a balcony. Meier became aware of the presence of law enforcement officers and, at that point, began to realize that he was in trouble. When the officers commanded Meier to stop, he instead ran away and jumped onto the roof of an adjacent building.

Meier had previously worked at Papa John's Pizza. One of his former managers testified as a character witness. According to the witness, Meier had been a good employee and had no disciplinary issues until he stopped showing up for work. According to this witness, things went "from good to bad" when Meier "got involved with some drugs." The witness had seen Meier under the influence of drugs "[m]ultiple times," and commented that Meier "wasn't the same person" when he used drugs. On one occasion, Meier's roommate, who was a friend of the former manager, called her about Meier. In response to the call, she went to their home. When she arrived, it was clear to her that Meier was under the influence of drugs. She convinced Meier to let her take him to the hospital.

The defense presented evidence that two days prior to the events underlying the current charges, Meier was arrested for being under the influence. At that time, officers found Meier standing on the roof of a McDonald's restaurant in Chula Vista, staring at the sky and "talking excessively." Asked to describe defendant's demeanor, a Chula Vista police officer testified that Meier presented with a "[g]lazed face, very glossy, staring at the sky and making nonsensical statements at the time." The officer believed that Meier was under the influence of a controlled substance. Another officer who performed a drug evaluation of Meier observed that he was fidgeting and twitching, and determined that he had an elevated pulse. In addition, Meier was speaking in a rambling manner, was making nonsensical statements, had rapid eye movements, and was unable to remain standing in one position. Officers recovered a meth pipe from Meier's bag.

B. *Procedural background*

A San Diego County jury convicted Meier of two counts of residential burglary (§§ 459 and 460, subd. (a)) and one count of resisting, obstructing, or delaying a peace officer in the discharge of her duties (§ 148, subd. (a)(1)). The jury also found true the allegation that another person was present in the residence during one of the burglaries (§ 667.5, subd. (c)(21)). Meier admitted that he had served a prior prison term (*id.*, subd. (b)), that he had been convicted of a prior serious felony (§§ 1170.12, 667, subds. (b)-(i)), and that he was on parole at the time of the burglaries (§ 1203.085, subd. (b)).

The court sentenced Meier to a term of 15 years eight months in state prison.

III.

DISCUSSION

A. *Meier is entitled to have the trial court exercise its discretion as to whether to impose or strike a five-year prior serious felony enhancement, under a recent amendment to the law*

On September 30, 2018, the Governor signed Senate Bill No. 1393 (Senate Bill 1393) which became effective on January 1, 2019. Senate Bill 1393 amended sections 667, subdivision (a) and 1385, subdivision (b) to allow a trial court to exercise its discretion to strike or dismiss a prior serious felony conviction for sentencing purposes. (Stats. 2018, ch. 1013, §§ 1–2.) Under the previous versions of these statutes, the trial court was required to impose a five-year consecutive term for "any person convicted of a serious felony who previously has been convicted of a serious felony" (former § 667, subd. (a)(1)), and had no discretion "to strike any prior conviction of a serious felony for purposes of enhancement of a sentence under Section 667" (former § 1385, subd. (b)).

Meier contends that the amended provisions of sections 667 and 1385 apply retroactively to all cases or judgments of conviction in which a five-year term was imposed at sentencing based on a prior serious felony conviction, provided that the judgment of conviction was not final at the time Senate Bill 1393 became effective on January 1, 2019. He contends that remand for a new sentencing hearing is required in such cases. The People concede that "[b]ecause appellant's judgment is not yet final, appellant is entitled to its retroactive application."

In *People v. Garcia* (2018) 28 Cal.App.5th 961, another division of this district held that "it is appropriate to infer, as a matter of statutory construction, that the

Legislature intended Senate Bill 1393 to apply to all cases to which it could constitutionally be applied, that is, to all cases not yet final when Senate Bill 1393 becomes effective on January 1, 2019." (*Id.* at p. 973.) We agree with the *Garcia* court's analysis, as well as the court's conclusion, and we therefore accept the People's concession that the amendments of Senate Bill 1393 apply retroactively to Meier's case.

However, the People further argue that remand for resentencing in this case is unwarranted because the trial court's statements at sentencing demonstrate that the court would not have dismissed the five-year enhancement even if it had discretion to do so at the time of Meier's sentencing. Typically, " 'when the record shows that the trial court proceeded with sentencing on the . . . assumption it lacked discretion, remand is necessary so that the trial court may have the opportunity to exercise its sentencing discretion at a new sentencing hearing.' " (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 425.) Remand is not required, however, if "the record shows that the trial court clearly indicated when it originally sentenced the defendant that it would not in any event have stricken [the previously mandatory] enhancement." (*Ibid.*)

The People note that the trial court stated that it would not "strike appellant's prior strike, an area in which the court did have the option to exercise discretion." The People also point out that the court "discussed imposing the upper term for sentencing, stating that it would be unconscionable to consider appellant's case to be a low-term case, and even noting that categorizing it as a mid-term case was a stretch," and that the court "made a point to note that it would not grant probation, even if it had the discretion to do so."

However, with respect to the five-year prior serious felony enhancement, specifically, the trial court's only comment was the following: "I will not impose the 1 year enhancement for the prison prior pursuant to the *People vs. Jones* decision, but I will impose the 5 year enhancement for the serious felony prior . . . under [section] 667[, subdivision](a)(1)." In other words, the court said nothing about what it would or would not have done if it had the discretion not to impose the five-year serious felony enhancement. On this record, we cannot conclude that the trial court would not have stricken the five-year prior serious felony enhancement if it had possessed the discretion to do so.

We therefore conclude that remand is appropriate to allow the trial court to resentence Meier and to exercise its new discretion with respect to whether to strike the five-year prior serious felony enhancement.[3]

B. *Meier is entitled to have the trial court consider placing him on mental health diversion under a newly enacted statute that became effective before the judgment in his case became final*

Meier contends that, due to a change in the law that became effective on the date of the verdict in his case, he is entitled to a conditional remand to allow the trial court to determine whether to place him on mental health diversion under newly enacted section 1001.36, which allows qualifying defendants to participate in pretrial diversion and receive mental health treatment in lieu of prosecution. (*Id.*, subd. (c).)

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3 We do not intend to suggest that the trial court should exercise its discretion to strike the enhancement at issue here; we make no comment as to the propriety of such a decision.

1. *Background regarding pretrial diversion*

Sections 1001.35 and 1001.36 authorize pretrial diversion for defendants with mental disorders. " '[P]retrial diversion' means the postponement of prosecution, either temporarily or permanently, at any point in the judicial process from the point at which the accused is charged until adjudication, to allow the defendant to undergo mental health treatment . . . ." (§ 1001.36, subd. (c).) A court may grant pretrial diversion under section 1001.36 if the court finds: (1) the defendant suffers from an identified mental disorder; (2) the mental disorder played a significant role in the commission of the charged offense; (3) the defendant's symptoms will respond to treatment; (4) the defendant consents to diversion and the defendant waives his or her speedy trial rights; (5) the defendant agrees to comply with treatment; and (6) the defendant will not pose an unreasonable risk of danger to public safety, as defined in section 1170.18, if the defendant is treated in the community. (§ 1001.36, subd. (b)(1).)

If the court grants pretrial diversion, "[t]he defendant may be referred to a program of mental health treatment utilizing existing inpatient or outpatient mental health resources" for "no longer than two years." (§ 1001.36, subd. (c)(1)(B) & (3).) If the defendant performs "satisfactorily in diversion, at the end of the period of diversion, the court shall dismiss the defendant's criminal charges that were the subject of the criminal proceedings at the time of the initial diversion." (*Id.*, subd. (e).)

2. *Retroactive application of the pretrial diversion statutes*

Courts generally presume that laws apply prospectively. (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 307 (*Lara*).) However, the Legislature may explicitly

or implicitly enact laws that apply retroactively. (*Ibid.*) To determine whether a law applies retroactively, we must determine the Legislature's intent in enacting the law. (*Ibid.*)

" 'When the Legislature amends a statute so as to lessen the punishment it has obviously expressly determined that its former penalty was too severe and that a lighter punishment is proper as punishment for the commission of the prohibited act. It is an inevitable inference that the Legislature must have intended that the new statute imposing the new lighter penalty now deemed to be sufficient should apply to every case to which it constitutionally could apply. The amendatory act imposing the lighter punishment can be applied constitutionally to acts committed before its passage provided the judgment convicting the defendant of the act is not final.' " (*Lara*, *supra*, 4 Cal.5th at p. 307, quoting *In re Estrada* (1965) 63 Cal.2d 740, 745.) " 'The *Estrada* rule rests on an inference that, in the absence of contrary indications, a legislative body ordinarily intends for ameliorative changes to the criminal law to extend as broadly as possible, distinguishing only as necessary between sentences that are final and sentences that are not.' [Citations.]" (*Id.* at p. 308.)

We conclude that the *Estrada* rule applies to section 1001.36 because section 1001.36 makes an ameliorative change to the law, in that it has the effect of potentially lessening the punishment for an offense by providing a defendant the possibility of diversion and subsequent dismissal of criminal charges upon successful completion of a diversion program. (See *People v. Frahs* (2018) 27 Cal.App.5th 784, 791 (*Frahs*), review granted Dec. 27, 2018, S252220.) In addition, a determination that section

1001.36 should be applied retroactively is consistent with the statute's stated purpose, which is to promote "[i]ncreased diversion of individuals with mental disorders to mitigate the individuals' entry and reentry into the criminal justice system while protecting public safety." (§ 1001.35, subd. (a).)

There is nothing in the statutory language that indicates that the Legislature did not intend to extend the potential benefits of section 1001.36 as broadly as possible, including to all defendants whose judgments are not final. Although the statute refers to "*pretrial* diversion," which is defined to mean the postponement of prosecution at any point during the judicial proceeding, from accusation to adjudication (§ 1001.36, subd. (c), italics added), we do not interpret the reference to "pretrial diversion" as being a sufficiently clear statement that the Legislature intended for the statute to apply only prospectively. (See *People v. DeHoyos* (2018) 4 Cal.5th 594, 600 [" '[A]n amendatory statute lessening punishment is presumed to apply in all cases not yet reduced to final judgment as of the amendatory statute's effective date' [citation], unless the enacting body 'clearly signals its intent to make the amendment prospective, by the inclusion of either an express saving clause or its equivalent' "].) Rather, as the *Frahs* court explained, "The fact that mental health diversion is available only up until the time that a defendant's case is 'adjudicated' is simply how this particular diversion program is ordinarily designed to operate. Indeed, the fact that a juvenile transfer hearing under Proposition 57 ordinarily occurs prior to the attachment of jeopardy, did not prevent the Supreme Court in *Lara*, *supra*, 4 Cal.5th 299, from finding that such a hearing must be made available to all

defendants whose convictions are not yet final on appeal." (*Frahs, supra,* 27 Cal.App.5th at p. 791, review granted.)

The fact that the Supreme Court decided *Lara* before the Legislature enacted section 1001.36 provides further support for our conclusion that the Legislature intended section 1001.36 to apply retroactively; the Legislature is deemed to have been aware of the *Lara* decision (see *People v. Overstreet* (1986) 42 Cal.3d 891, 897). If the Legislature had intended for the courts to apply section 1001.36 differently from the statute addressed in *Lara,* we would have expected the Legislature to have expressed this intent clearly and directly, rather than obscurely and indirectly. (See *In re Pedro T.* (1994) 8 Cal.4th 1041, 1049 [to counter the *Estrada* rule, the Legislature must "demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it"].)

We therefore conclude that section 1001.36 applies retroactively to Meier's case, which was not final at the time section 1001.36 became effective.

3. *Meier is entitled to remand for the court to consider whether to grant him diversion under section 1001.36*

The People contend that even if this court concludes that section 1001.36 applies retroactively, this court should nevertheless refuse to remand the matter to the trial court because Meier "does not qualify for diversion anyway." (Boldface and some capitalization omitted.) According to the People, "[t]he trial court's discussion of appellant's substance abuse, appellant's own statements regarding his substance abuse, and the court's application of the sentencing scheme, show that the court would not have

found appellant eligible for diversion under . . . section 1001.36," and that therefore, remand to the trial court "to exercise this discretion would be futile."

Effective January 1, 2019, section 1001.36, subdivision (b)(3) provides, "At any stage of the proceedings, the court may require the defendant to make a prima facie showing that the defendant will meet the minimum requirements of eligibility for diversion and that the defendant and the offense are suitable for diversion. The hearing on the prima facie showing shall be informal and may proceed on offers of proof, reliable hearsay, and argument of counsel. If a prima facie showing is not made, the court may summarily deny the request for diversion or grant any other relief as may be deemed appropriate." The purpose of the provision is to determine whether a defendant is potentially eligible for diversion. (See Sen. Rules Com., Off. of Sen. Floor Analyses, Unfinished Business Analysis of Sen. Bill No. 215 (2017-2018 Reg. Sess.) as amended Aug. 23, 2018, p. 2 [the prima facie showing provision "[a]uthorizes a court to request a prima facie hearing where a defendant must show they are potentially eligible for diversion"].) We conclude that on this record, there is sufficient evidence from which one could conclude that Meier might meet the minimum requirements of eligibility for diversion and that he is suitable for diversion.

There is evidence in the record that Meier suffers from a substance use disorder that may qualify as a mental disorder for which diversion would be available. At sentencing, the trial court effectively acknowledged a number of times that Meier has an addiction to illicit drugs and has had problems in addressing that addiction. In addition, the record demonstrates that Meier has previously been diagnosed with depression and

bipolar disorder. The record is thus sufficient to establish Meier's potential eligibility for mental health diversion.

We are not persuaded by the People's contentions that there is no possibility that the trial court would consider placing Meier on diversion. The People argue that the trial court "made clear that it did not find that appellant's substance abuse played a significant role in his offense." However, the trial court's comments on which the People rely involve the court's discussion of the court's and jury's rejection of Meier's defense that the entire incident was part of a drug-induced hallucination. A rejection of this version of events is not the same as reaching the conclusion that Meier's substance abuse disorder did not "play[] a significant role in the commission of the charged offense." In fact, it appears that everyone involved in this case, including the court, acknowledged that Meier's substance abuse played some role in his commission of the offenses. Again, the statute does not require that the defendant's mental disorder completely excuse the criminal conduct at issue but, rather, only that the mental disorder "played a significant role" in its commission.

Similarly, the People contend that the trial court's comments about Meier's unsuitability for probation suggest that remand is unnecessary. The People's reliance on the court's observations about probation are misplaced because Meier is not asking for a grant of probation, and it is possible that there are treatment options available in a diversion program that would entail a more structured and monitored environment than what could be ordered for a defendant on probation. Ultimately, the trial court is better

situated than this court to determine in the first instance the suitability of mental health treatment options available through a diversion program.

Finally, the People argue that the record does not support a conclusion that Meier would consent to diversion and agree to comply with treatment as a condition of diversion, given that Meier made statements to the effect that his drug use "impacted him positively." However, the fact that Meier is requesting remand for a hearing to determine his suitability for a diversion program suggests that he would agree to comply with treatment. (See § 1001.36, subd. (b)(1)(E).)

In remanding the case, we express no view as to whether the trial court should ultimately conclude that Meier qualifies for diversion under section 1001.36 or, if he does qualify, whether the court should exercise its discretion to place Meier on diversion. We conclude only that section 1001.36 applies retroactively, and that it is for the trial court to determine in the first instance whether the statute applies and, if so, whether to exercise its discretion to place the defendant on diversion under the statute.

IV.

DISPOSITION

The judgment is reversed. The case is remanded to the superior court with directions to conduct a mental health diversion eligibility hearing under section 1001.36. If the court determines that Meier qualifies for diversion, the court may exercise its discretion to grant diversion, and if Meier successfully completes diversion, the court shall dismiss the charges.

If the court determines that Meier is ineligible for diversion or that Meier is not an appropriate candidate for diversion despite qualifying under the statute, or if the court places Meier on diversion but he fails to successfully complete diversion, then the court shall reinstate Meier's convictions and conduct further sentencing proceedings, as appropriate. At any resentencing, the trial court shall exercise its discretion with respect to whether to strike or reimpose the five-year prior serious felony enhancement.

AARON, J.

WE CONCUR:

MCCONNELL, P. J.

O'ROURKE, J.